prefer and justify the New York view.[17] On purely logical reasoning there is something to be said for both views—since they proceed on different theories in judging proximate cause. But from a standpoint of business expediency and protection of shippers, it seems that on the whole the New York view is preferable. Not that it cannot be carried to an extreme that would be burdensome to the carrier. But if administered wisely it is more just to the shipper and places the loss where it belongs. Under the Federal rule the carrier can delay the shipment and escape liability simply because the damage is conveniently done by an "Act of God." The tendency of late has been against such a result—in fact, the court in the Maine case admits that the majority of jurisdictions are probably *contra* to the view it adopts. And it is unfortunate that this salutary holding should now be changed simply because a Federal Act is so worded as to be involved whenever the shipment is interstate. It is doubtful if Congress realized that this result would follow the Carmack Amendment; if it did and intended that the Federal rule should be enforced throughout the country, it is to be regretted, since so many courts of unquestioned standing have adopted the contrary and more advantageous view.

R. T. B.

CONSTITUTIONAL LAW—STATE TAX ON FOREIGN INSURANCE COMPANIES—"INTERSTATE COMMERCE"—"DOING BUSINESS"—The extent to which a state may tax a foreign corporation doing business within its borders has always been a subject of contention between the various states and the Federal Government; and while the numerous decisions of the Supreme Court upon the various phases of this problem have firmly established a number of fundamental rules, in many close cases there is still a substantial element of doubt as to what the decision will be. This doubt is due to the difficulty of applying well-established principles rather than to any uncertainty as to what principles are to be applied.

It is now settled, beyond peradventure of doubt, that no state is bound to recognize a foreign corporation *as such;* nor is any state bound to permit such a corporation, as such, to enter the state and transact business therein, except with such limitations and upon such conditions as the state may choose to impose.[1] This conclusion is possible because Article IV, Section 2 of the Constitution, which provides that, "The citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states," does

[17] Hutchinson, Carriers (2d Ed.), Sec. 200; Ray, Negligence of Imposed Duties (Freight Carriers), p. 175 ff.

[1] Augusta Bank v. Earle, 13 Pet. 519 (U. S. 1839); Pembina Milling Co. v. Penna., 125 U. S. 181 (1889).

not apply to artificial persons such as corporations.[2] A state may, therefore, impose a tax upon a foreign corporation for the privilege of transacting business within the state, provided that such tax does not operate as an interference with foreign or interstate commerce,[3] nor as an unjust discrimination between different foreign corporations of the same class, after they have been admitted to do business within the state.[4] It is, however, a very difficult problem to say just what does amount to an interference with interstate commerce. The courts themselves have indicated an uncertainty and a disagreement upon this subject which has tended to confuse rather than clarify the situation. There are, however, certain well-settled principles as to what constitutes an interference with interstate commerce which may serve as guideposts toward reaching an accurate conclusion in any new cases which may arise.

In *Paul* v. *Virginia*,[5] it was decided that the issuing of a policy of insurance was not a transaction of interstate commerce; and a corporation whose sole business is the issuance of policies of insurance and the performance of other transactions incident thereto is not engaged in interstate commerce so as to be immune from regulation by any state into whose jurisdiction it may come. It therefore follows that a state may impose any conditions which it sees fit upon a foreign insurance corporation desiring to do business within the state for the privilege or franchise of doing such business, just as in the case of other types of strictly private foreign corporations.[6] Accordingly, it has been repeatedly affirmed that a tax on the gross earnings or receipts within the state of a foreign corporation, not engaged in interstate commerce, is a proper exercise of the taxing power, as it is a tax on the privilege of doing business within the state, measured by the volume of business done therein.[7] But a state may not, under the guise of a tax on the privilege of doing

[2] Paul v. Va., 8 Wall. 168 (U. S. 1868). It should be noted, however, that a private corporation is included under the designation of "person" in the Fourteenth Amendment, Section 1. Pembina Milling Co. v. Penna., *supra*, n. 1.

[3] Home Ins. Co. v. N. Y., 134 U. S. 594 (1889); Horn Mining Co. v. N. Y., 143 U. S. 305 (1892); Com. v. N. Y., L. E. & W. R. Co., 129 Pa. St. 463 (1889).

[4] Henderson v. London, *etc.*, Ins. Co., 135 Ind. 23 (1893).

[5] 8 Wall. 168 (U. S. 1868).

[6] Note 3, *supra*.

[7] Society for Savings, *etc.*, v. Coite, 6 Wall. 594 (U. S. 1867); Southern Association v. Norman, 98 Ky. 294 (1895); Raymond v. Ins. Co., 196 Ill. 329 (1902); Fargo v. Auditor-Gen., 57 Mich. 598 (1885); People v. Home Ins. Co., 92 N. Y. 328 (1883); W. U. Tel. Co. v. Mayer, 28 Ohio St. 521 (1876). Compare also Pittsburgh Life and Trust Co. v. Young, 90 S. E. 568 (N. C. 1916), where it was held that a tax on the gross receipts *in the state* of a foreign insurance company included premiums paid by policyholders within the state by mail directly to the home office of the company in another state; and Mutual Life Ins. Co. v. Ohio, 79 Ohio St. 305

business within the state, levy a *property* tax on the gross income of a foreign corporation received within the state during the preceding year, because the power of a state to tax property is limited to property within its borders, and the gross income received by a foreign corporation is not necessarily property within the state. Such a property tax on gross income of a foreign corporation is unconstitutional as the taking of property without due process of law.[8] In order for a state to tax a foreign corporation for the franchise of doing business within the state, it is also necessary that the corporation should actually carry on business within the state. An isolated or occasional sale or other business transaction is not sufficiently a "doing business" within the state so as to subject a foreign corporation to a franchise tax.[9] Also, a foreign corporation whose entire assets are invested in the stock of a domestic corporation, and whose sole income is derived therefrom, is not "doing business" within the state.[10]

The problem as to what extent a state may tax a foreign corporation, engaged in interstate commerce, is a more difficult one. The general rule, of course, is that a state may not tax interstate commerce; from which it follows as a corollary that a state may not tax a foreign corporation for the privilege of carrying on interstate commerce within its borders, as such a tax would be a direct burden upon interstate commerce.[11] But a distinction has been drawn between corporations organized to carry on interstate commerce and having a quasi-public character, and corporations organized to conduct strictly private business; and while in case of the former, a state may not tax the corporation for the privilege of conducting its business within the state, in case of the latter the state may tax the corporation for such privilege, although it is engaged, in part, in interstate commerce as incidental to its general business. Such a tax is not considered a tax on the privilege of engaging in interstate commerce, but a tax on the privilege of doing

(1909), where it was held that a tax on the gross amount of premiums *received in the state* did not include premiums sent by policyholders within the state by mail directly to the home office of the company in another state.

[8] Del., *etc.*, R. R. Co. v. Penna., 198 U. S. 341 (1905); Louisville & J. Terry Co. v. Ky., 188 U. S. 385 (1903); N. Y. Life Ins. Co. v. Bradley, 83 S. C. 418 (1909).

[9] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 (1885); Kilgore v. Smith, 122 Pa. St. 48 (1888).

[10] People v. Kelsey, 101 N. Y. App. 205 (1905).

[11] McCall v. Cal., 136 U. S. 104 (1890); Norfolk, *etc.*, R. R. Co., 136 U. S. 114 (1890); Crutcher v. Ky., 141 U. S. 47 (1891). A state may, however, tax a domestic corporation engaged in interstate commerce for the privilege of being a corporation. Kansas City Ry. v. Kansas, 242 U. S. 227 (1916); Cornell Steamboat Co. v. Sohnur, 235 U. S. 549 (1915).

a strictly private business within the state, although the conduct of such business may in fact involve interstate commerce.[12]

But although a state may not tax a foreign corporation for the privilege of engaging in interstate commerce, it may tax the property of such corporation which is actually within the state, although such property is being used in interstate commerce,[13] provided the "payment of the tax be not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means devised for the collection of taxes." [14] An important distinction is also drawn between the property employed to carry on interstate commerce, which may be taxed, and the property which forms the commerce, which may not be taxed while actually in transit.[15] This does not mean, however, that a state may not tax property which has been a part of interstate commerce or which is designed to become a part of such commerce at a future date.[16] It is now a well-settled principle that a state may not tax a foreign corporation on its gross receipts, as such, received within the state from interstate commerce, because a tax on such gross receipts is, in effect, a direct burden on interstate commerce, which cannot be justified as a property tax, because gross receipts are not now considered by the courts as part of the taxable property of a corporation.[17] But a property tax, strictly speaking, frequently bears a close resemblance to a tax on gross receipts, which fact has been productive of a certain degree of confusion in the law. The value of the property of a business or industrial concern is closely co-related with the earning powers of such property as represented by the gross receipts of the business; and as the gross receipts of a corporation increase or diminish, so also may the value of the property which contributed to those receipts be said to increase or diminish. Therefore, in taxing a foreign corporation upon the basis of the property which it owns within the state, it is permissible for the state to consider the property as a productive agency, whose value is proportional to and

[12] Pembina Milling Co. v. Penna., *supra*, n. 1. Horn Mining Co. v. N. Y., 143 U. S. 305 (1891); N. Y. v. Roberts, 171 U. S. 658 (1898); Baltic Mining Co. v. Mass., 213 U. S. 68 (1913).

[13] Pullman Car Co. v. Penna., 141 U. S. 18 (1891). A property tax laid on property without the state is illegal either as a deprivation of property without due process of law, or as a direct burden upon commerce. W. U. Tel. Co. v. Kansas, 216 U. S. 1 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910).

[14] Postal Tel. Co. v. Adams, 155 U. S. 688 (1895).

[15] Coe v. Erroll, 116 U. S. 517 (1886). As to what constitutes actual transit, see General Oil Co. v. Crain, 209 U. S. 211 (1908); Susquehanna Coal Co. v. South Amboy, 228 U. S. 665 (1913).

[16] Brown v. Houston, 114 U. S. 622 (1885).

[17] Fargo v. Mich., 121 U. S. 230 (1887); Phila. S. S. Co. v. Penna., 122 U. S. 326 (1887); Galveston, *etc.*, Rwy. Co. v. Texas, 210 U. S. 217 (1908).

fluctuates with the receipts of the corporation to which it contributes. A state may, therefore, levy a tax upon the property, within its borders, of a foreign corporation, although the amount of the tax is dependent upon the gross receipts of the corporation within the state, it being considered that the gross receipts, in such case, are simply an index, or measure, of the value of the property.[18] Although the rule is clear, it is often difficult, as a practical matter, to distinguish the two forms of tax; but where, from the facts, the court is convinced, in any particular case, that the state is attempting to tax the gross receipts of a foreign corporation engaged in interstate commerce, under the guise of a tax upon its property, it will declare the tax illegal. The recent decisions of the Supreme Court indicate a pronounced tendency on the part of the court to look behind forms and to ascertain what was the real intention of the state in assessing the tax, and upon what the tax operates as a matter of fact, rather than to formulate any stereotyped rules to govern all cases. If the tax is, in effect, an indiscriminatory property tax, it will be upheld, though in the form of a tax on gross receipts; while on the other hand, if, in effect, it is a tax on the gross receipts derived from interstate commerce, or on the privilege of engaging in interstate commerce within the state, it will be repudiated.[19]

E. L. H.

INSURANCE—RIGHT OF BENEFICIARY—TERMINATION OF CONTINGENT RIGHT OF CHILD—IS BENEFICIARY'S RIGHT TESTAMENTARY OR CONTRACTUAL?—It is a common proviso in a policy of life insurance payable to the wife of the insured, that in the event of her death before the insured, it shall be payable to her children. Where the contingency occurs, by the death of the wife before the insured, in which children does the interest vest? Does it vest in all those living at the time the policy is issued; that is to say, are the representatives of a child who has predeceased the mother entitled to share; or does it vest solely in those surviving the mother? If there are three children living at the date of issuance of a policy containing such a clause and one child dies, followed by the death of the mother, are the proceeds divisible between the two surviving children or will the issue or personal representative of the deceased child be entitled to a share? Two distinct lines of cases are found in the reports construing such policies of insurance. One line

[18] Maine v. Grand Trunk Co., 142 U. S. 217 (1891); Postal Tel. Co. v. Adams, 155 U. S. 688 (1895); U. S. Expr. v. Minn., 223 U. S. 335 (1912); Baltic Mining Co. v. Mass., 231 U. S. 68 (1913).

[19] Galveston, *etc.*, Rwy. Co. v. Texas, 210 U. S. 217 (1908); U. S. Expr. Co. v. Minn., 223 U. S. 335 (1912); Baltic Mining Co. v. Mass., 231 U. S. 68 (1913); Kansas City Rwy. v. Kans., 240 U. S. 227 (1916).